Filed 6/8/10 P. v. Polack CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY POLACK, Defendant and Appellant.	E048052 (Super.Ct.No. FSB803767) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Donna G. Garza, Judge. Affirmed.

Terrence V. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lilia E. Garcia and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Anthony C. Polack was convicted of receiving stolen property (to wit, a gun) (Pen. Code, § 496, subd. (a)),[1] assault with a firearm (§ 245, subd. (a)(2)), and being a felon in possession of a firearm (§ 12021, subd. (a)(1)). In a bifurcated proceeding, the court found that defendant had suffered two prior prison terms within the meaning of section 667.5 and a prior serious felony conviction under sections 1170.12, subdivision (a) and 667, subdivision (b). He was sentenced to state prison for 12 years 8 months.

Defendant contends the trial court erred in failing to properly instruct the jury as to the element of possession for the counts of receiving stolen property and being a felon in possession of a firearm. Specifically, he argues the trial court failed to properly instruct the jury on the definition of "constructive possession" and the requirement that defendant exert "knowing or intentional" control over the item. He further asserts the court's oral instruction that defendant made a false statement was error. Lastly, he contends that prior to sentencing the court improperly communicated with the probation officer in an ex parte manner and that the sentences for receiving stolen property and being a felon in possession of a firearm should have been stayed under section 654.

We conclude the trial court properly instructed the jury as to the possession elements for receiving stolen property and being a felon in possession of a firearm. We further hold that while the court erred in its oral instructions to the jury relative to defendant making a false statement, the jury was provided with the correct written

[1] All further statutory references are to the Penal Code unless otherwise indicated.

instruction and any error was harmless. Finally, we find no error in the sentencing phase of the proceeding.

II. FACTS

Adolph Trinidad's .357 Rossi revolver was stolen from his Calimesa home in the early morning hours of September 11, 2008.

At approximately 11:15 a.m. that day, defendant entered a Fast Trip store in Yucaipa and gave the cashier a suspicious $20 bill.[2] The cashier called Ghulan Sarwar, the manager of the store, out from a back room. After looking at the bill, Sarwar told defendant it looked like a bad bill and that he was going to call the police. As Sarwar walked to the telephone to call the police, defendant said, "'Give me my money back.'" Sarwar asked defendant to wait for the police. Defendant left. Sarwar saw defendant get into the passenger seat of a pickup truck and leave.

As defendant exited the Fast Trip store, Joshua Tillery was about 10 feet from the door of the market, putting gas in his motorcycle. Tillery looked up when he heard someone call him by his old nickname, "Danger." Tillery had known defendant in the past. Defendant pulled a gun from his waist area and walked up to Tillery. Defendant held the gun about six to eight inches from Tillery's face. The gun was a black snub nose revolver and was fully loaded. Tillery could tell it was loaded because he could see the

[2] A security videotape was shown at trial that depicted defendant handing a $20 bill to the cashier.

bullet heads in each slot of the barrel of the gun.[3] As defendant held the gun up to Tillery, defendant said, "'Now what, bitch?'" Defendant then walked away, saying, "'you're dead.'" Tillery saw defendant get into the passenger side of a white truck. While seated in the truck, defendant continued taunting Tillery with the gun. The entire encounter lasted about one minute.

Both Tillery and Sarwar called the police. Deputy Considine responded to the Fast Trip market and spoke with both victims. Following some initial investigation, sheriff's deputies responded to a nearby residence at 910 Bryant Street.

When Deputy Clinton Miller arrived at the residence, defendant and another man were standing in the front yard. Upon observing the deputy, both men went into the house. As the two men entered the house, other sheriff's units arrived. Shortly thereafter, defendant walked out of the house with his hands up.

Deputy Considine questioned defendant. Defendant told Deputy Considine he did have a $20 bill that was given to him, but he did not know it was fake. Defendant further indicated that he used a gun, but it was not a real gun. Deputy Considine asked defendant to help find the gun, but defendant would not cooperate.

Detective Newport searched the house. At the time of the search there were numerous individuals present. Deputy Newport found a plastic neon reddish-green fake

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[3] Deputy Jim Considine testified that a person would be able to see the bullets in the gun if it was pointed at him from a distance of six to eight inches. Detective Trevis Newport also indicated that if one was looking down the barrel of the weapon, one would be able to see the bullets in it; the copper tips would be observable.

gun, as well as a silver fake gun with orange paint on it. Both appeared to be squirt guns. The silver gun with the orange paint was located in the workshop area of the rear garage. The deputy also found a loaded Rossi .357 revolver. It was the same gun that had been stolen from Trinidad earlier that morning. The gun was found on a closet shelf in the rear west bedroom. Neither of the fake guns were found in a bedroom. In the bedroom where the Rossi .357 was found, there were no documents indicating who resided in that room.

Toby Baca testified that he met defendant at Baca's cousin's friend's house on the day of the incident. Baca did not know defendant prior to this meeting. Baca gave defendant a ride in Baca's car. Defendant told Baca where they could get some gas money. When they could not find any gas money, they went to the Bryant Street address, where Baca's cousin lived. Only his cousin and grandmother were living at the house at that time.

Baca was at the Bryant Street house when the deputies arrived. As far as he knew, both bedrooms in the house were empty because his cousin was moving out of the house. He saw one of the deputies come out of the back bedroom carrying a pistol. Baca testified he had not seen the pistol prior to that time. He denied telling a deputy he saw a handle of a black revolver in defendant's pants pocket. Rather, he told the deputy he saw a black cell phone sticking out of defendant's right front pocket.

On the day of the incident, Deputy Considine spoke with Baca while both were at the Bryant Street address. Deputy Considine testified that Baca told him that while he was giving defendant a ride, Baca saw a gun in defendant's right front pocket.

Tillery testified that on the day following the incident, Deputy Considine showed him a gun. The gun matched to a "T" the gun that was pointed at him. Tillery also identified defendant in a photographic lineup.

III. ANALYSIS

A. *The Trial Court Properly Instructed the Jury as to Possession*

For the crimes of receiving stolen property and being a felon in possession of a firearm, the trial court instructed the jury with Judicial Council of California Criminal Jury Instructions, CALCRIM Nos. 1750 and 2511, respectively. Defendant argues that both instructions oversimplify the notion of possession by "eliminating such concepts as 'knowing or intentional control' and 'constructive possession.'" He contends that as a result he was deprived of his right to a jury trial on the element of possession.

To support his position, defendant juxtaposes the CALCRIM instructions given with CALJIC No. 1.24; defendant argues that CALJIC No. 1.24 appropriately communicates the concept of "possession," whereas the CALCRIM instructions do not. We disagree.

In determining whether jury instructions correctly state the law, our standard of review is de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

For purposes of receiving stolen property and being a felon in possession of a firearm, possession may be actual or constructive. (*People v. Land* (1994) 30 Cal.App.4th 220, 223; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.) For both crimes, regardless of whether the possession is actual or constructive, the defendant must

know of the item's presence and knowingly have either physical custody of it or the right of control over it. (*People v. Gatlin* (1989) 209 Cal.App.3d 31, 44-46; *People v. Snyder* (1982) 32 Cal.3d 590, 592.) The knowledge requirement implies an intent to possess the stolen property or firearm. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425; *People v. Jeffers, supra,* at p. 922.) The CALCRIM instructions given communicated each of these essential elements.

Looking first to CALJIC No. 1.24, possession is defined as follows: "Actual possession requires that a person knowingly exercise direct physical control over a thing. [¶] Constructive possession does not require actual possession but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons." CALJIC No. 1.21 defines "knowingly" as having knowledge of the existence of the facts in question. Thus, as it relates to possession under the CALJIC instruction, the defendant must know the gun is present and must know he is possessing it.

In the present case, the jury was instructed on receiving stolen property (CALCRIM No. 1750), as follows:

"To prove that the defendant is guilty of this crime [of receiving stolen property], the People must prove that:

"1. The defendant received/concealed or withheld from its owner . . . property that had been stolen;

"2. When the defendant received/concealed or withheld the property, he knew that the property had been stolen;

"AND

"3. The defendant actually knew of the presence of the property. [¶] . . . [¶]

"To receive property means to take possession and control of it. Mere presence near or access to the property is not enough.

"Two or more people can possess the property at the same time. A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person."

Regarding the charge of being a felon in possession of a firearm, the jury was instructed in accordance with CALCRIM No. 2511 that the People must prove that:

"The defendant received or possessed a firearm;

"The defendant knew that he received or possessed the firearm; [¶] . . . [¶]

"[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]"

While the phraseology of the CALJIC instruction may differ from the CALCRIM instructions, the import is identical and both accurately reflect the law. In each of the instructions the jury is unequivocally told that defendant has to know he is possessing the gun and that such possession includes control or the right of control over the gun. The

fact that the CALCRIM instructions have been written to avoid the terms "constructive" and "actual" possession does not invalidate them.

Furthermore, defendant's argument relative to any misinstruction on constructive possession has no applicability to the present case. Here, there was no issue concerning constructive possession of the gun. There is evidence that defendant had the gun in his actual possession when he entered and exited the convenience store, as well as when he left the store and pulled the gun from his pants to assault Tillery. Defendant either physically possessed the gun or he did not possess it at all. There is no dispute the jury was properly instructed as to actual possession. Thus, even if we assume the jury was misinstructed relative to constructive possession, such a concept is not "closely and openly connected" to the *facts of the case*, and any error in this regard would be harmless. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 269-270 [trial court must instruct only on the law which is "closely and openly connected" to the evidence in the case].)

B. *The Trial Court's Erroneous Oral Instruction as to Consciousness of Guilt Was Harmless*

We agree with both parties that the trial court erred in its oral instruction to the jury on the issue of consciousness of guilt. In reading CALCRIM No. 362 to the jury, the trial court misspoke. The jury was orally instructed as follows: "The defendant made a false or misleading statement relating to the charged crime knowing the statement was false or intending to mislead. That conduct may show that he was aware of his guilt of the crime, and you may consider it in determining his guilt. [¶] If you conclude that the

defendant made the statement, it is up to you to decide its meaning and importance. However, the evidence that the defendant made such a statement cannot prove guilt by itself." Rather than be told "[t]he defendant made a false or misleading statement . . . ," the jury should have been instructed with, "If the defendant made a false or misleading statement . . . ."

Whether defendant made a false or misleading statement was a factual issue for the jury to determine. The instruction as orally conveyed, however, arguably removed this preliminary determination from the jury. (See *People v. Lucas* (1995) 12 Cal.4th 415, 466-467 ["'[t]he preliminary fact questions . . . are not finally decided by the judge because they have been traditionally regarded as jury questions'"].) However, any error in this regard is harmless.

We first note that the jury was provided with the proper written instruction of CALCRIM No. 362. And, as noted in *People v. Crittenden* (1994) 9 Cal.4th 83, 138, when there is a discrepancy between the oral and written instruction, it is presumed that jurors are guided by the written instruction (see also *People v. Osband* (1996) 13 Cal.4th 622, 687 [oral misstatement of instructions are harmless when the correct written instructions are provided to the jury]).

Moreover, the oral instruction itself was internally inconsistent. The jurors were first instructed that "[t]he defendant made a false or misleading statement"; later in the same instruction they were told that "*[i]f you conclude that the defendant made the statement*, it is up to you to decide its meaning and importance." (Italics added.) In light

of this part of the instruction, a reasonable juror hearing the entire oral instruction would likely believe that he or she still maintained a factfinding role as to the preliminary fact of whether defendant made a false statement.

Additionally, the jurors were correctly told that if they determined defendant did make a false statement, it was for them to decide the meaning and importance of it and that they "may" (but were not required to) use it as evidence of guilt. Taken as a whole, the instruction did not necessarily compel a jury conclusion that defendant made a false statement and that it was to be used as evidence of his guilt. (See *People v. Vang* (2009) 171 Cal.App.4th 1120, 1129 [jurors likely considered the instruction as a whole and did not apply it in an impermissible fashion].)

Moreover, when viewed in context with the evidence, any oral miscommunication of the instruction was clearly harmless. Defendant pointed a gun at Tillery. The gun was stolen and was found at a residence when defendant was present. Defendant was identified by Tillery as the individual who pointed a gun at him, and the gun found at the residence matched the gun used by defendant to a "T." Additionally, after defendant was asked by the investigating deputies to help locate the gun, he became uncooperative. Two toy guns were found at the residence, and they appeared to be squirt guns. The oral misinstruction, we conclude, was harmless. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. *Defendant Was Not Deprived of Due Process as a Result of the Trial Court Communicating With the Probation Officer*

At the beginning of the sentencing hearing the following colloquy appears:

"THE COURT: I did contact the probation department to clarify what they were recommending in this matter. And they were recommending the aggravated term.

"[DEFENSE COUNSEL]: Well, that doesn't comport with what we see on page 7.

"THE COURT: I'm willing to have the probation officer come forward. And I did call her—or had this court call her to clarify what the recommendation was. And their recommendation, based upon the aggravated, was the upper term, doubled, for the eight years, as opposed to the mid-term, doubled . . . . [¶] . . . [¶]

"[DEFENSE COUNSEL]: It appears they're recommending the mid-term. If you look at . . . .

"THE COURT: [Defense counsel], I understand completely their analysis. That's why I called probation to ask probation what they were recommending, and they were recommending the aggravated term."

Defendant contends the court's ex parte communication with the probation department denied him the due process right to a full and fair sentencing hearing. Specifically, he argues that "the trial judge's approach was objectionable because the consideration of *ex parte* information provided an adverse finding based on unsworn testimony that could not be cross-examined or rebutted." We disagree.

As the trial court observed, the probation report in this case is inconsistent. The probation officer recommended "the middle term of four (4) years for Count 3." However, the middle term for count 3 (§ 245, subd. (a)(2)) is three years; the aggravated term is four years. Moreover, the discussion contained within the report supports only the imposition of the aggravated term. It was thus unclear whether the probation officer was recommending the middle term or the aggravated term of four years.

In *People v. Valdivia* (1960) 182 Cal.App.2d 145, the court rejected an argument similar to defendant's argument here. In *Valdivia*, a probation officer consulted with the judge in chambers prior to a probation hearing. The Court of Appeal found no error. It stated: "The Penal Code makes no specific provision for a consultation between court and probation officer. Yet, as a practical matter the only way in which a court could obtain clarification of a report if needed would be to request additional information or explanation from the probation officer. However, if such request results in any new or additional information being given the court, such information must be incorporated in the report. As we have observed hereinbefore, probation proceedings require the use of hearsay in order to provide the court with a complete history and background of the defendant. Nevertheless fair play requires that it be conveyed to the court by written report and that a copy be made available to the defendant. Otherwise if inaccurate or false information were given to the probation officer which he in turn were to convey to the court orally, the defendant would be unable to present contrary evidence to disprove such information. The defendant has the right to present testimony or other evidence on

his behalf [citation]. Clearly this extends to statements contained in the probation officer's report. . . . In this case, however, there is nothing in the record before us to indicate that the court received any information bearing upon defendant's application for probation which was not contained in the report." (*Id.* at p. 149.)

Here, it appears from our record that the court contacted the probation department solely to clarify an inconsistency in the report. There is nothing to indicate that there was any "new or additional information being given the court[.]" (*People v. Valdivia*, *supra*, 182 Cal.App.2d at p. 149.) We therefore find no error or misconduct as it relates to the trial court seeking clarification of the probation report.

Furthermore, defendant's contention that the ex parte communication deprived him of due process because he was unable to cross-examine the probation officer is belied by the record. The court specifically indicated that it was willing to have the probation officer "come forward." Defendant gave no indication that he desired the probation officer's presence or that he objected in any way to the court's clarifying call.

The cases relied upon by defendant are inapposite. In *People v. Archerd* (1970) 3 Cal.3d 615, the judge's consultation with doctors constituted an "extrajudicial inquiry" that "gave no opportunity to counsel to examine or cross-examine the experts with whom he spoke." (*Id.* at p. 638.) In *Roberts v. Commission on Judicial Performance* (1983) 33 Cal.3d 739, a trial judge committed misconduct when he spoke ex parte with the prosecutor, defense counsel, and the reviewing appellate court relative to one of his rulings that was the subject of a writ proceeding. (*Id.* at pp. 747-748.) And, in *People v.*

Farmer (1989) 47 Cal.3d 888, the court indicated that while a judge may speak with another judge about the law in the abstract, he should not inquire of another judge as to how he should rule on any specific matter. (*Id.* at p. 923.) In the present case, none of these circumstances are present. Here, the court did not, in an ex parte fashion, receive any facts that were not already contained in the probation report. All that was sought was a clarification of an apparent inconsistency in the report. The cases cited are therefore inapposite here.

D. *The Court Did Not Err in Imposing Consecutive Sentences for Receiving Stolen Property and Felon in Possession of a Firearm*

The trial court sentenced defendant to eight years for assault with a deadly weapon.[4] The court further imposed consecutive sentences for receiving stolen property (the gun) and being a felon in possession of a firearm. Defendant argues that both of the latter sentences should have been stayed pursuant to section 654. We disagree.

"Section 654 prohibits multiple punishment for a single act or an indivisible course of conduct. [Citations.] Whether a defendant's conduct constitutes a single act under section 654 depends on the defendant's intent in violating penal statutes. If the defendant harbors separate though simultaneous objectives in committing the statutory violations, multiple punishment is permissible." (*People v. Williams* (2009) 170 Cal.App.4th 587, 645 [Fourth Dist., Div. Two].) Additionally, "[m]ultiple criminal

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[4] The sentence of eight years was arrived at by using the aggravated term of four years and doubling that term based upon a prior felony conviction under section 1170.12, subdivision (c)(1).

objectives may divide those acts occurring closely together in time." (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1565.)

"The trial court has broad latitude in determining whether section 654, subdivision (a) applies in a given case. [Citations.] In conducting the substantial evidence analysis we view the facts . . . 'in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]'" (*Garcia*, *supra*, 167 Cal.App.4th at p. 1564.) Here, there was substantial evidence upon which the trier of fact could conclude that defendant had multiple criminal objectives during the time period he committed the crimes.

The facts before the court unambiguously support the factual conclusion that defendant both entered and exited the convenience store in possession of a Rossi .357 handgun. To have entered the store with the stolen handgun, he must have previously received it. After exiting the store, he assaulted Tillery by holding the gun to his face and then left the scene in possession of the gun. Clearly, these are at least three separate and distinct acts—receiving the gun, possessing it as he entered and exited the store, and assaulting Tillery with it. While occurring close in time, each crime had separate and distinct criminal objectives. (See *People v. Taylor* (1969) 2 Cal.App.3d 979, 984-985 [receiving a stolen gun is separate and distinct from being a felon in possession of a firearm for section 654 purposes].)[5]

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[5] Defendant relies on *People v. Bradford* (1976) 17 Cal.3d 8 and *People v. Venegas* (1970) 10 Cal.App.3d 814 for the proposition that there was no evidence to support the conclusion that the possession of the gun was separate from the assault. We

[footnote continued on next page]

IV. DISPOSITION

The judgment is affirmed.

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/s/ King
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Miller
J.

[footnote continued from previous page]
disagree. Clearly, this is not a case where a defendant comes into possession of the gun fortuitously at the instant of committing the assault. (See *People v. Jones* (2002) 103 Cal.App.4th 1139, 1145-1146.)